NO. 82-6274

In the Supreme Court of the United States

OCTOBER TERM, 1982

HURIE JONES

Plaintiff-Appellant

VS.

ORLEANS PARISH SCHOOL BOARD

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I.

Whether or not the trial and appellate courts committed reversible prejudicial error by concluding in their opinions that appellant's state law claims were not properly before those courts; where appellant repeatedly alleged, at all times, in his original civil complaint, supplemental complaint and all subsequent pleadings and briefs that he was a tenured science teacher of eight and one half (8½) years service. Further, that appellee, Orleans Parish School Board, terminated or fired appellant without granting him a tenure hearing, notwithstanding the fact that *appellant is a tenured science teacher, entitled to notice and an opportunity to have a due process tenure hearing,* before being fired or terminated, as provided by state law or the Teacher Tenure Act, cited as R.S. 17:461, R.S. 17:462 and as guaranteed by the Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution.

II.

Whether or not the trial and Appellate Courts committed reversible prejudicial error by refusing to take judicial notice of the fact that appellant has clearly and continuously alleged State and Federal law claims, in his original and supplemental complaint based upon his status as a tenured science teacher, who is entitled to a due process tenure hearing before he can be lawfully terminated or fired from his teaching position, as provided by state law or the Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462; where appellant, as a tenured science teacher, has been granted by state law, cited as Louisiana Civil Code

Article 3538, three (3) years within which to institute a lawsuit in response to appellee's refusal to follow the authority and formalities of state law or the Teacher Tenure Act as cited above. The provisions of Louisiana Civil Code Article 3538 are as follows:

> "Article 3538. *Actions prescribed by three (3) years.*
>
> The following actions are prescribed by three (3) years: That for arrearages of rent charges, annuities and alimony, or of the hire of movables and immovables. That for the payment of money lent. *That for salaries* of overseers, clerks, secretaries and *of teachers of the sciences who give lessons by the year or quarter.* That of physicians, surgeons and apothecaries for visits, operations and medicines. That of parish recorders, sheriffs clerks and attorneys for their fees and emoluments. That on the accounts of merchants, whether selling for wholesale or retail. That on the accounts or retailers of provisions, and that of retailers of liquors, who do not sell ardent spirits in less quantities than a quart. That on all other accounts. *This prescription only ceases from the time there has been an account acknowledged in writing, a note or bond given, or an action commenced.*"

III.

Whether or not the trial and appellate courts committed reversible prejudicial error by refusing to take judicial notice, as stated in all of appellants' pleadings, that his state created tenure status vested him with entitlements to substantive and procedural due process rights, privileges, and immunities, as a tenured science

teacher, pursuant to state law or R.S. 17:461 and R.S. 17:462; that Louisiana Civil Code Article 3538 controls or enunciates the state statute of limitation or period within which appellant, as a tenured science teacher, may file a lawsuit to redress appellee's action of ex parte termination, as guaranteed by the due process and equal protection of law provisions of the Fourteenth (14th) Amendment to the United States Constitution.

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IN THE
SUPREME COURT OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

OPINION BELOW

The trial court's opinion in this case was not published. The first opinion of the Fifth Circuit Court of Appeal was published and filed on June 21, 1982. Appellee's petition for rehearing en banc was granted and the second opinion of the Fifth Circuit Court of Appeals was published and filed on October 4, 1982. Appellant's petition for rehearing en banc of the second adverse opinion of the Fifth Circuit Court of Appeals was summarily denied and filed on November 16, 1982; all of which are reprinted in the appendix herein.

The Federal District Court's decision dismissing appellant's complaint was filed March 25, 1981.

JURISDICTION OF THE COURT

The United States Court of Appeals for the Fifth Circuit filed its first opinion in this case on June 21, 1982 and filed its second opinion, after granting appellee's petition for rehearing and suggestion for rehearing en banc, on October 4, 1982. Appellant's petition for rehearing and suggestion for rehearing en banc was filed on October 27, 1982, and summarily denied by "order" and filed on November 16, 1982.

Notice of appeal was filed in the Fifth Circuit Court of Appeals on November 23, 1982. The time within which to docket this appeal expires on March 16, 1983. Timely docketing of this appeal has been made. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. Section 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant filed this civil lawsuit, in the Federal District Court for the Southeastern District of Louisiana, on August 19, 1977 and filed, with leave of the trial court, a supplemental complaint on August 13, 1982.

The jurisdiction of this court is invoked in appellant's civil complaint pursuant to 28 U.S.C. Section 1343 and 1331, 42 U.S.C. Section 2000-3-5(f). Appellant's civil action is further authorized and instituted pursuant to section 706(f) (1) and (3) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Public Law No. 92-261, hereafter referred to as Title VII, 42 U.S.C. Sections 1981, 1983, 2201, 2202, Rules 8(a) and 57 of the Federal Rules of Civil Procedure.

The jurisdiction of this court is further invoked pursuant to the Constitution of the United States; specifically the First (1st), Fifth (5th) and Fourteenth (14th) Amendments thereto.

The pendent jurisdiction of the trial and appellate courts is invoked pursuant to state laws or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462; Louisiana Civil Code Articles 21, 1761, 1765, 1779, 1901, 1926, 1930, 1934 (2)(3), 2315, 2317, 2320, 2324, *3538* and 3544.

Plaintiff-Appellant, who is a black citizen of the United States, is alleging that appellee deprived him of his civil rights, privileges, and immunities under pretense, custom or usage and color of state laws secured to appellant by the Federal and State Constitutions; which ultimately deprived appellant of equal protection of law, due process of law, quality life, liberty, property, good name, positive reputation and career opportunities past, present and future.

Thus, the constitutional rights sought to be protected herein are guaranteed by the Fourteenth (14th) Amendment Right to equal protection of the law and due process of law, their deprivation is sufficient to confer jurisdiction of this court pursuant to 28 U.S.C. Section 1331. Deprivation of the above enunciated constitutional rights would also be sufficient to confer the jurisdiction of this court pursuant to 28 U.S.C. Section 1343(3) and (4).

Further, 28 U.S.C. Section 1343 (3) provides for invoking the original jurisdiction of this court for the deprivation of appellant under color and pretense of state law(s) of any rights, privileges and immunities secured to

him by the United States Constitution or acts of Congress guaranteeing all citizens equal rights; while 28 U.S.C. Section 1343(4) provides for invoking the original jurisdiction of this court to recover damages or to secure equitable or other relief pursuant to any act of Congress providing for the protection of Civil Rights.

The Congress of the United States has made its power available to this court to enforce the provisions of the Fourteenth (14th) Amendment to the United States Constitution against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or not. Thus, appellants allegations of facts constituting a deprivation under color and pretense of state authority of rights guaranteed by the Fourteenth (14th) Amendment satisfies to that extent the requirements of 42 U.S.C. section 1983; giving a right of action against a person who under color of state law, custom or usage, subjects another to the deprivation of any rights, privileges and immunities secured by the Federal Constitution.

Further, misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, "*is an action taken under color and pretense of state law*," within the meaning of 42 U.S.C. section 1983; which does not require specific intent to deprive a person of a federal right to create liability. See *Monroe V. Pape,* 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473.

Furthermore, private individuals may be held liable pursuant to 42 U.S.C. sections 1983 and 1985(3) if they conspired with a person who acted under color and pretense of state law; whether such conduct constituted acts of omis-

sion or commission which injures plaintiff-appellant in his person or property as a result of "an invidious class-based animus". See *Griffin V. Breckenridge*, 403 U.S. 88.

STATEMENT OF THE CASE

JUDICIAL REVIEW OR REMOVAL OR TERMINATION OF A PERMANENT OR TENURED SCIENCE TEACHER PURSUANT TO STATE LAW: CITED AS R.S. 17:461 AND R.S. 17:462 AND LOUISIANA CIVIL CODE ARTICLE 3538.

Appellant has substantially alleged, clearly and repeatedly to the trial and appellate courts, in his original, supplemental complaints and all subsequent pleadings, *that appellant is a tenured science teacher of eight and one half (8½) years service; but notwithstanding his status as a tenured teacher,* pursuant to state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462, *appellee terminated or fired appellant without affording him an opportunity to have a due process tenure hearing, as mandated by state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462;* therefore, appellant's state law claims have always been properly before the trial and appellate courts.

Thus, appellant's state and Federal law claims emanates or grows out of his status as a tenured science teacher, pursuant to state law or the Louisiana Teacher Tenure Act, that is a substantive and procedural statutory law, cited as R.S. 17:461 and R.S. 17:462; *therefore state law mandates that appellant Hurie Jones cannot be lawfully terminated or fired without being afforded a due process tenure hearing, as guaranteed by the due process of law and equal protection of law provisions of the Fifth (5th) and*

Fourteenth (14) Amendments to the Constitution of the United States.

Finally, after appellant's civil rights, immunities, privileges and entitlements having been denied or violated by appellee's actions of subjecting appellant to ex parte termination; *he has three (3) years, as a tenured science teacher, within which to file or initiate a lawsuit, as provided by Louisiana Civil Code Article 3538,* calculated to redress appellee's failure or refusal to follow the mandatory formalities of the Louisiana Teacher Tenure Act or state law, cited as R.S. 17:461 and R.S. 17:462; as guaranteed by the due process and equal protection of law provisions of the Fourteenth (14th) Amendment to the United States Constitution.

Further, it is a basic and elementary principle of constitutional law that had a non-tenured teacher been fired or terminated, as in the case of appellant Hurie Jones, such non-tenured teacher could not have successfully invoked the jurisdiction of any state or Federal Courts for appellee's actions of termination without being afforded a hearing; nor could such non-tenured teacher demand of appellee any reasons for an ex parte termination.

Thus, no due process hearing is required or mandated by Louisiana law; as non-tenured teachers have not acquired or earned any vested property rights or entitlements to continue employment that is protected by state law. Therefore, the due process of law and equal protection of law provisions of the Fourteenth (14th) Amendment to the United States Constitution does not attach to any employment rights of a non-tenured teacher who is terminated at the end of his written contract or the end of a school term.

Therefore, appellant Hurie Jones tenure status creates or forms the bases of his state and Federal Law claims in recognition of appellant's having earned specific legal substantive and procedural rights, privileges, immunities and entitlements, pursuant to state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462, which mandates that appellee follow the specific procedural formalities of the teacher tenure act or state law as cited above; as guaranteed by the due process and equal protection of law provisions of the Fourteenth (14th) Amendment to the United States Constitution. Thus, appellee having violated the above delineated state and Federal law provisions; appellant has three (3) years within which to initiate a lawsuit calculated to redress such violations; pursuant to Louisiana Civil Code Article 3538.

Furthermore, appellant's state law claims alleging appellee's violation of his tenure rights, privileges, immunities and entitlements pursuant to R.S. 17:461, R.S. 17:462 and Louisiana Civil Code Article 3538 have always been clearly expressed in all pleadings presented to the trial and appellate courts.

Therefore, the standard of judicial review of the school board's actions of subjecting appellant Hurie Jones to summary or ex parte termination, as a permanent tenured teacher, is whether there is a rational basis for the school board's action or determination that is supported by substantial evidence as contained in the transcript of a tenure hearing at which appellant Hurie Jones was found guilty of administrative charges; that the tenure hearing was conducted according to the formalities of the teacher tenure law or state law cited as R.S. 17:461, R.S. 17:462 and the due process and equal protection of law provisions of the Fourteenth Amendment to the United States Constitution.

Thus, the three substantial issues alluded to or delineated above constitutes in every respect the major assignment or errors which address themselves to the scope of judicial review of the school board's actions of terminating appellant Hurie Jones.

Therefore, this court should limit its inquiry to a determination of whether the action of the appellee, Orleans Parish School Board was (1) in accordance with the authority and formalities of the Louisiana Teacher Tenure Act or state law, cited as R.S. 17:461 and R.S. 17:462 and (2) supported by substantial evidence as contained in a transcript of a tenure hearing at which appellant was actually found guilty of administrative charge or conversely, whether the school board's action of termination constitutes an arbitrary and capricious decision and thus an abuse of its discretion.

Finally, the principles of law delineated above, in an effort to assist this court in its judicial review, have been consistently stated and restated in a succession of cases decided in the trial and appellate courts of the state of Louisiana as supported by *State ex rel. Rath V. Jefferson Parish School Board,* 206 La. 317, 19 So.2d 153, 167-168, *Granderson V. Orleans Parish School Board,* 216 So.2d 643, *McCoy V. Tangipahoa Parish School Board,* 308 So.2d 382, *Howell V. Winn Parish School Board,* 322 So.2d 822, *Cook V. Natchitoches Parish School Board,* 343 So.2d 702 and *Rooks V. Rapides Parish School Board,* 366 So.2d 605.

THE ESSENTIAL ELEMENTS OF APPELLANT'S STATE AND FEDERAL LAW CLAIMS AS A TENURED SCIENCE TEACHER

1.) Appellant, having received written notice from

appellee, in a document dated October 28, 1969, acknowledging that appellant had earned and had become fully vested or entitled to all the rights, privileges and immunities of a tenured science teacher, pursuant to state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461, R.S. 17:462 and Louisiana Civil Code Article 3538.

2.) Appellant, a tenured science teacher, was employed by appellee, Orleans Parish School Board, for eight and one half years (8½), beginning on August 29, 1966, under a written contract of continuous employment; but was terminated or fired by appellee on March 8, 1976 without giving appellant written notice nor did appellee afford him the opportunity to have a due process tenure hearing as mandated by state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462.

3.) Thus, appellant suggest to this court that he has clearly and unequivocally delineated to the trial and appellate courts the manner and substantial extent to which appellee has violated specific state and Federal laws guaranteeing his civil rights, privileges and immunities and the resulting deprivation thereof under color and pretense of state laws enunciated above; as evidence by appellant's original and supplemental civil complaints filed with the Federal District Court, appellant's motion for Summary Judgment and supplement thereto; submitted to the Federal District Court. Further, appellant restated and clarified specific state and federal

law claims in his original and reply briefs to the United States Court of Appeals for the Fifth Circuit, previously invoked or presented to the District court.

4.) Therefore, after appellee had fired or terminated appellant without following the authority and formalities of state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462, appellant has three (3) years, as a tenured science teacher, pursuant to Louisiana Civil Code Article 3538, within which to file a lawsuit in a court of competent jurisdiction in an effort to obtain a legal remedy to appellee's unlawful ex parte termination of him in violation of his civil rights protected by state laws enunciated above; and as ultimately guaranteed by the due process and equal protection of law provisions of the Fourteenth (14th) Amendment to the United States Constitution.

Louisiana Civil Code Article 3538 provides the following remedy for appellant.

"*Civil Code Article 3538; actions prescribed by three (3) years. The following actions are prescribed by three (3) years:*

That for arrearages of rent charges, annuities and alimony, or of the hire of movables or immovables. That for payment of money lent. *That for salaries* of overseers, clerks, secretaries and *of teachers of the sciences who give lessons by the year or quarter.* That of physicians, surgeons and apothecaries for visits, operations and medicines. That of parish recorders, sheriffs, clerks, and attorneys for their fees and emoluments. That on

> the account of merchants, whether selling for wholesale or retail. That on account of retailers of provisions, and that of retailers of liquors, who do not sell ardent spirits in less quantities than a quart. That on all other accounts. *This prescription only ceases from the time there has been an account acknowledged in writing, a note or bond given, or an action commenced.*"
>
> 5.) Appellant, having become vested with all the entitlements, rights, privileges and immunities of a tenured science teacher, pursuant to state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461 and R.S. 17:462 which grants appellant substantive and procedural due process rights that are guaranteed by the Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution.

Further, appellant's status as a tenured science teacher, as guaranteed by state law cited herein, provides that appellant has three (3) years, pursuant to Louisiana Civil Code Article 3538, within which to file or initiate a lawsuit in a court of competent jurisdiction calculated to redress appellee's violation of appellant's civil rights to continued employment as a tenured science teacher; as protected by the above enunciated provisions of the state and Federal laws.

Furthermore, if appellant was a non-tenured teacher, who was not rehired at the end of his annual contract of employment or at the end of the school year, he would not have any lawful right of action nor any lawful cause of action to institute any form of lawsuit in state or federal court against appellee herein. Therefore, a non-tenured teacher, who is not rehired at the end of his contract, is

only entitled to a timely notice that he will not be rehired for the next succeeding school year, no reasons or pre-termination hearing are required by state law (Louisiana).

Thus, no Federal due process and equal protection of law, rights, privileges and immunities attaches to the state's actions of terminating a non-tenured teacher because the state laws do not provide that such non-tenured teacher be given entitlements to any property rights to continuous employment. Therefore, mere refusal to rehire does not violate any vested rights under state or federal laws to continuous employment of a non-tenured teacher because no property rights to continuous employment will exist until the tenure status has been earned.

As a matter of constitutional and statutory law, cited as R.S. 17:461, R.S. 17:462 and Louisiana Civil Code Article 3538, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to specified procedures. A non-tenured teacher, similarly, is protected to some extent during his one year term, but the law provides no real protection for a non-tenured teacher who simply is not re-employed for the next year, he must be given a timely notification "concerning retention or non-retention for the ensuing year." But no reason for non-retention need be given. No review or appeal is provided in such case.

The requirement of procedural due process applies only to the deprivation of liberty and property. When protected interest is implicated, the right to some kind of pre-termination hearing is paramount. But to determine whether the due process requirement applies in the first instance, we must look not to the "weight" but to nature of the interest at stake. See *Morrissey V. Brewer*, 92 S.Ct.

2593, 408 U.S. 471. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Supreme Court's decision in *Board of Regents V. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry V. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972), established that a pre-termination hearing must be granted to an employee whenever a decision to discharge him will deprive him of either a property interest, such as his continued right to work under an employment contract or a liberty interest, such as his freedom to protect his "good name, reputation, honor or integrity." *Board of Regents V. Roth*, 408 U.S. at 573, 576, 92 S.Ct. at 2707 (1972). In *Roth*, the court noted that mere proof that an employee's discharge from one job "might make him less attractice to other employers would be sufficient to establish the kind of foreclosure of future opportunities that will amount to a deprivation of "liberty interest," such as his freedom to protect his good name, reputation, honor or integrity, as guaranteed by the Fourteenth Amendment to the United States Constitution.

The court made it clear in *Board of Regents V. Roth*, 408 U.S. 571-572, that "Property" interest subject to procedural due process protections are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understanding" at 577.

Appellant, herein, has an interest in benefits that are equivalent to a "property interest" for due process purposes that there are such rules or mutually explicit understandings that support his claims of entitlement to the benefits and that appellant may invoke at an appropriate hearing.

Appellant's written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports his claims as a teacher of entitlement to continued employment. Yet absence of such explicit written contractual provisions may not always foreclose the possibility that a teacher has a "property interest" in continued employment. For example, the law of contracts in this jurisdiction long employed a process by which agreements, though not formalized in writing, may be strongly implied.

Explicit contractual provisions may be supplemented by other agreements implied from the "promisor's words and conduct in the light of the surrounding circumstances," and that the meaning of the promisor's words and acts is found by relating them to the usages of the past. Thus, appellant having acquired tenure under a valid written contract has legitimate claim of entitlement to continued employment without interpreting the circumstances surrounding his professional services to establish entitlement to his position as a teacher.

Under existing administrative and statutory guidelines, appellant, Hurie Jones, was entitled to notice of any termination proceedings and the specific charges made against him, and an opportunity to rebut those charges in writing.

The question which we must now decide is whether the due process clause of the Fourteenth Amendment to the United States Constitution entitles him to any procedural protection. I maintain that it does.

The Supreme Court expansively broadened the scope of procedural due process protection in a well known series

of cases *e.g., Perry V. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Board of Regents V. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d, 548 (1972); *Bell V. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 90 (1971); *Wisconsin V. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *Goldberg V. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Nevertheless, as a threshold requirement the appellant in the public employment dismissal case herein has a legitimate entitlement with respect to his teaching position, which would be protected as property under the Fifth or Fourteenth Amendments, or that his dismissal deprives him of liberty interest protected by those constitutional provisions. See *Board of Regents V. Roth, supra,* 408 U.S. at 569-71, 92 S.Ct. 2701.

Pursuant to the factual circumstances of the case and the authorities cited herein the court has abundantly ample bases for finding that appellant herein, has suffered deprivation of "liberty" and "property" interest that will have substantially diminished appellant's future, social and economic mobility, especially in view of the fact that black citizens, such as appellant, have and continue to suffer from racial stigmatization as well as such charges of abandonment made by appellee herein, that a balancing of interests analysis is justified to determine what level of procedural protection is appropriate, *e.g., Fusari V. Steinburg,* 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975); *Board of Regents V. Roth, supra,* 408 U.S. at 570-71, 92 S.Ct. 2701; *Morrissey V. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Appellant's principle due process claim is based upon the fact that his termination because of alleged

charges of abandonment of his teaching position "deprived him of liberty" because it seriously damaged and stigmatized appellant in his reputation and standing in his socio-economic communities and impaired his ability to obtain appropriate employment commensurate with his educational preparations.

The seriousness of appellant's claim is no small injury, the Supreme Court has repeatedly emphasized that "in a constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed", *Board of Regents V. Roth, supra,* 408 U.S. at 572, 92 S.Ct. at 2707 (1972).

Liberty and property interest relate to the whole domain of social and economic fact, that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society. Where a person's good name, reputation, honor or integrity is at stake because of what an employer has done to him, notice and an opportunity to be heard are essential. The courts, alluded to herein have reasoned that such action by employers infringed upon appellant's protected interests, because it "foreclosed or diminished" his opportunities for economic or occupational advancements.

However, in the interest of fundamental fairness, where the employer publicly disseminate information concerning its adverse personnel action, as in appellant's case herein, the court should, with great scrutiny proceed to determine whether the information disclosed is of such derogatory nature as to infringe upon the liberty interest of an employee. see *Bishop V. Wood,* 426 U.S. 341, 348, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Velger V. Cawley,* 525

F.2d 334 (1975); *Codd V. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).

Any discharge of an employee, as in the case of appellant herein, shall be given written notice of his discharge setting forth the effective date and reasons for his discharge.

In *Perry V. Sindermann*, 408 U.S. 593, 601, the court said that a "person's interest in the benefits derived from his continued employment is a property interest for due process purposes if there are rules or mutually explicit understanding that support his claims of entitlement to the benefits and that he may invoke such authoritie in support of his claims at an appropriate hearing."

"Property interests in continued employment, of course, are not created by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Rather, they are created and their dimensions are defined by existing administrative and legal rules or understandings that stems from an independent source such as state law (R.S. 17:461 and R.S. 17:462) rules or understandings that secure specific benefits to an employee and that support claims of entitlement to those benefits", *Board of Regents V. Roth*, 408 U.S. 564, 577.

In *Annette V. Kennedy*, 416 U.S. 134, the court concluded that because the employee could only be discharged for cause established in an appropriate hearing, as in appellant's case herein, he had a property interest which was entitled to Constitutional protection.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents fundamental and substantial questions involving a tenured science teacher's state created substantive and procedural rights, of a property and liberty interest, to continued employment, under a subsisting written bilateral contract, as guaranteed by state law or the Louisiana Teacher Tenure Act, cited as R.S. 17:461, R.S. 17:462, Louisiana Civil Code Article 3538, the First (1st), Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution.

Thus, the most substantial question, to be resolved by this court is how the Federal District Court, Fifth Circuit Court of Appeals and all parties to this case or controversy can agree, and they have done so, that appellant Hurie Jones is a tenured science teacher of eight and one half (8½) years service, pursuant to state law or the Louisiana Teacher Tenure Act or R.S. 17:461, R.S. 17:462, Louisiana Civil Code Article 3538 and that appellant was subjected to ex parte termination; while on the other hand the Federal District Court erroneously denied appellant judgment without citing or mentioning the state tenure law and Louisiana Civil Code Article 3538 as controlling prescription, which was cited in appellant's motion for Summary Judgment prior to trial.

Further, the Fifth Circuit Court of Appeals also denied appellant judgment without citing or mentioning the state tenure law, cited in all stages of the litigation by appellant, notwithstanding the uncontroverted fact that the Fifth Circuit Court of Appeals acknowledged appellant was a tenured science teacher granted by state law and that the applicable statute of limitation was provided by Louisiana Civil Code Article 3538; but denied appellant

judgment upon the erroneous ambiguous grounds that appellant's, above cited, state law claims were not properly before the Fifth Circuit Court of Appeals in its opinions of June 21, 1982 and October 4, 1982.

Respectfully submitted
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APPENDIX "A"

Hurie JONES, Plaintiff-Appellant,

v.

ORLEANS PARISH SCHOOL BOARD,
Defendant-Appellee.

No. 81-3204

United States Court of Appeals
Fifth Circuit.

June 21, 1982.

Black school teacher brought suit alleging he had been discharged unlawfully on basis of his race and that he had been denied due process. The United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, Jr., accepted magistrate's recommendation and rendered judgment for school board, and plaintiff appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge held that: (1) black school teacher's section 1981 and section 1983 claims of racial discrimination in employment were governed by Louisiana one-year limitations period applying to "offenses and quasi-offenses" and were time barred; (2) teacher's section 1983 claim alleging due process violations was not time barred; (3) fact issue existed as to whether actions taken by board before it discharged teacher were adequate to comply with requisite due process; (4) evidence showed that board discharged teacher because it believed that he had abandoned his job, and not because of his race; and (5) there was no error in certain evidentiary rulings.

Affirmed in part, reversed in part and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Hurie Jones, a black male, was employed as a school teacher by the Orleans Parish School Board in 1966. He was granted tenure in 1969. At his request, he was given a leave of absence without pay from August, 1972, until January, 1974. He returned to teaching unitl June, 1974, when he requested another leave of absence. The School Board granted Jones' request for leave to expire on May 30, 1975. During this time, Jones was attending law school.

When he left the school system on leave in June, 1974, Jones was told that he had to notify the School Board by June 1, 1975 of whether or not he intended to return to teaching for the 1975-76 school year. On May 30, 1975, Jones wrote to the School Board by certified mail expressing his "irrevocable intention" to return to teaching for the 1975-76 term. On June 4, 1975, the School Board wrote to Jones saying that in order to be reinstated he had to complete and return an enclosed form and then bring in person a medical certificate to the Division of Personnel so that he could be interviewed regarding his return.

Jones completed and returned the form on June 9, 1975. The form provided a space for the applicant's name, his former school, address, and subject(s) taught. Because the space for the address immediately followed the space

for the name of his former school, Jones gave the address of Green Middle School where he had last taught. On the bottom of the form he checked the box in front of the statement "I will return on 8/25/75."

On June 11, 1975, Jones visited his doctor and procured the requisite certificate. He testified that he took the certificate to the Division of Personnel sometime thereafter; however, the School Board had no record of receiving the certificate. On August 24, 1975, Jones again wrote to the School Board by certified mail stating that he was scheduled to return to teaching and was awaiting an assignment. He testified that when he did not receive an assignment, he called the Board several times but was unable to get any response. Jones returned to law school that fall and graduated in May, 1976. There was no further communication between Jones and the Board until the following February.

On February 2, 1976, Assistant Superintendent of Personnel, Alfred Hebeisen, wrote to Jones to inform him that he was absent without authority and therefore subject to termination. Mr. Hebeisen acknowledged receipt of Jones' June 9, 1975, letter containing the completed form and instructed Jones to supply an explanation for his absence. If an explanation was not tendered, the letter continued, Hebeisen would recommend Jones' termination to the Board. This letter was sent to 2319 Valence Street, the address of Green Middle School. This was, of course, the address supplied by Jones on the Board's form. The letter was returned to the Board by the Post Office, but the exact date of its return is unknown. Sometime thereafter, someone in Mr. Hebeisen's office attempted to contact Jones by telephone but was unable to do so. On the bottom of the returned letter of February 2 is a handwritten note which

reads "Abandoned position—Efforts to contact were unsuccessful."

On February 18, 1976 Mr. Hebeisen again wrote to Jones. In this letter he informed Jones that his position at Green Middle School was terminated because he had abandoned it. This letter also was sent to the Green Middle School address. Whether the first letter had been returned by the time the second was mailed is not reflected in the record. This second letter was also returned sometime thereafter.

On March 8, 1976, the School Board approved Mr. Hebeisen's recommendation that Jones be terminated. The following day, Hebeisen wrote to Jones to inform him of this action. This letter was sent to Jones' correct address—the address at which he had been living since before his leave of absence. Hebeisen testified that he found this address in Jones' personnel file.

On March 15, 1976, Jones filed a complaint with the Equal Employment Opportunity Commission pursuant to 42 U.S.C. § 2000e—5(e) alleging that he had been discharged unlawfully on the basis of his race. He received a right-to-sue letter on May 17, 1977. On August 19, 1977, he filed the present lawsuit alleging violations of Title VII, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. § 1985. The case was tried before a magistrate who made findings and recommendations. The magistrate found that Jones' § 1981 and § 1983[1] claims

[1] Neither the magistrate's findings nor the court's judgment mentions the § 1985 claim. In his original complaint, Jones alleged § 1985 as a jurisdictional basis of his suit; however, he did not allege supporting facts. It was not until his supplemental memorandum in support of his motion for summary judgment that Jones elaborated on the § 1985 claim. There, he argued that his termination was the culmination of a

were barred by the one year statute of limitations contained in La.Civ.Code art. 3536. With respect to the Title VII claim, the magistrate found that Jones had been terminated because he had abandoned his position and that this happened routinely to white as well as black teachers. The magistrate concluded that there was no racial discrimination involved in Jones' termination, and he recommended that judgment be entered in favor of the Board of the Title VII claim. The district court accepted this recommendation and entered judgment accordingly.

In this appeal, Jones contends: (1) the court erred in applying a one year, rather than a three year, statute of limitations to the § 1981 and § 1983 claims; (2) the School Board denied him due process by terminating him without first giving him notice and an opportunity to be heard; (3) the court erred in holding that he failed to prove racial discrimination under Title VII; and (4) the School Board violated various state laws in the termination procedure.

I. *Statute of Limitations Under §§ 1981 and 1983*

Because Congress did not establish a limitations period for §§ 1981 and 1983 actions, federal courts apply the state law of limitations governing analogous causes of action. *Braden v. Texas A&M University System*, 636 F.2d 90, 92 (5th Cir. 1981). To accomplish this, the court must characterize the claim as it would be characterized under state law and then determine the state limitations period which would apply to that type of claim. *Shaw v. McCorkle*, 537 F.2d 1289, 1292 (5th Cir. 1976).

(Footnote 1 continued)
conspiracy which began in 1971 when he filed a complaint with the School Board alleging discrimination of the part of a school principal. The School Board never responded to this claim, and the court never ruled on it.

In this case, Jones presented two different claims under the two statutes. He alleged first, that he was discriminated against on the basis of his race in violation of both §§ 1981 and 1983, and second, that he was denied his right to due process in violation of § 1983. We characterize each of these claims separately and then look to Louisiana law to determine the applicable limitations period. *Whatley v. Department of Education,* 673 F.2d 873, 878 (5th Cir. 1982).

In *Page v. U.S. Industries, Inc.,* 556 F.2d 346, 351-52 (5th Cir. 1977), *cert. denied,* 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978), we held that a § 1981 claim of racial discrimination in employment was best characterized under Louisiana law as a tort and should be governed by La.Civ.Code art. 3536's[2] one year limitations period which applies to "offenses and quasi-offenses." Because the right to be free from racial discrimination is independent of any contractual right an employee may have, we held inapplicable the three year period provided by La.Civ.Code art. 3538[3], which governs actions arising out of certain employment contractual relationships. *Accord Shelley v. Bayou Metals,* 561 F.2d 1209 (5th Cir. 1977). This same reasoning applies to a racial discrimination claim brought under §

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[2] La.Civ.Code art. 3536 provides:

The following actions are prescribed by one year:

* * * * * *

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi-offenses.

3. La.Civ.Code art. 3538 provides:

The following actions are prescribed by three years:

* * * * * *

That for the salaries of overseers, clerks, secretaries, and of teachers of the sciences who give lessons by the year or quarter.

1983.[4] *Cf. Whatley, supra* at 878 (because the "essential nature" of the claim determines the applicable limitations period, the same period applies to substantially identical racial discrimination claims whether brought under § 1981 or § 1983—applying Georgia law) and *Braden*, 636 F.2d at 92 (applying Texas law). Therefore, the court was correct in holding that Jones' claim of racial discrimination under §§ 1981 and 1983 was time-barred.[5]

Jones' § 1983 claim alleging due process violations should not have been dismissed as time-barred, however. In *Pegues v. Morehouse Parish School Board*, 632 F.2d 1279 (5th Cir. 1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2322, 68 L.Ed.2d 844 (1981), we held that La.Civ.Code art. 3536's one year limitation period applied to a claim by a black coach who alleged that he had been demoted on the basis of his race. We concluded, however, that if he had been tenured and had sued for the violation of his rights *as a tenured teacher*, the three year limitations period of La.Civ.Code art. 3538 would have been applicable. Jones' right to due process arises out of his status as a tenured teacher, and therefore art. 3538 controls. Because Jones filed this suit less than three years after he was terminated, his due process is not time-barred.

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[4] Although the district court never ruled on the § 1985 claim, we find that the claim was barred by art. 3536's one year statute of limitations because Louisiana characterizes civil conspiracies as "offenses or quasi-offenses." *See* La.Civ.Code art. 2315; *Ingram v. Freeman*, 326 So.2d 565, 570 (La.App.1976), *writ denied*, 329 So.2d 755 (La.1976).

[5] We also note that Jones did not pursue the racial claims under §§ 1981 and 1983 at oral argument. Further, even if these claims had not been time-barred, res judicata or collateral estoppel may have prevented consideration of the racial issues because the court below made findings of fact as to whether Jones was discharged on the basis of his race with respect to the Title VII claim. *See Barker v. Norman*, 651 F.2d 1107, 1130 (5th Cir. 1981).

II. *Due Process*

Jones argues that his right to due process, which is secured by the Fourteenth Amendment to the United States Constitution, was violated because the Board did not give him notice and an opportunity to be heard before he was terminated. The Board contends that Jones "abandoned" his teaching position and therefore was not entitled to notice and hearing. In the alternative, the Board argues that it fulfilled its obligations under the due process clause.

A public employee may claim procedural due process rights upon termination if he has a property interest in continued employment. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Property interests are not created by the due process clause; rather, they stem from independent sources such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). In order to receive constitutional protection of a property interest, one must have a "claim of entitlement" to the interest. *Id.* Once it is determined that a public employee has a protected interest in continued employment, the Constitution requires that he be given notice and an opportunity to be heard prior to termination. *Gosney v. Sonora Independent School District*, 603 F.2d 522, 525 (5th Cir. 1979). Because Jones was a tenured teacher, it is clear that he had a protected interest in continued employment. *See* La.Rev.Stat. § 17:462. Therefore Jones was entitled to be heard by the Board before he was discharged if there were any issues which raised the need for a hearing.

The Board's first defense to the due process claim is that Jones "abandoned" his position by failing to comply with the reinstatement requirements and that therefore he was not entitled to notice or a hearing. In support of this

contention the Board cites a Louisiana Supreme Court decision which held that the failure of a tenured teacher to return a signed contract by a specified date constituted a voluntary termination of employment and a waiver of the teacher's right to notice and a hearing under Louisiana's Teacher Tenure Law. *State ex rel. Cody v. Caldwell Parish School Board,* 215 La. 645, 41 So.2d 461 (1949).

Obviously, a state has the right to provide for the termination of teachers and other public employees who abandon their positions. But in the case of tenured employees, the process of discharging employees for "abandonment" must comport with due process requirements. For example, the state may not by simply labeling some action or lack of action "abandonment" create a right to discharge a public employee as a subterfuge to defeat tenure requirements. Whether Louisiana can by law require automatic discharge of a tenured teacher who after adequate notice admittedly fails to return a signed contract by a specified date we need not here decide. But if there is any factual issue about whether the teacher did fail to meet the requirements, the teacher is entitled to notice and hearing with respect to such issue. If there is an issue as to the facts and their application to the statute, the automatic waiver of notice and hearing provided in the Louisiana Teacher Tenure Law could not be applied without running afoul of Fourteenth Amendment due process requirements. The question before us is whether the constitutional rights of Jones under the due process clause of the Fourteenth Amendment were respected by the School Board in its actions which led to his discharge for "abandoning" his teaching position.[6] The Board cannot under

[6] The Board cannot argue that Jones' alleged abandonment was the equivalent of a voluntary resignation so that the Board never actually terminated him. The Board instituted actions to have Jones

the contested facts of this case rely upon an automatic right to discharge without any obligations on the Board to take actions by way of communication with Jones and giving him the opportunity to be heard on disputed issues.

The Board did take actions before it discharged Jones; the question is whether they were adequate to comply with requisite due process. The Board contends that it fulfilled its obligations to the best of its ability by twice attempting to notify Jones of the pending action so that he would have an opportunity to be heard. The Board argues that it was Jones' fault that he address he gave was incorrect. Mr. Hebeisen's personnel office did all it could, the Board contends, to notify Jones. The mistake in the address was not realized until after both the letters had been returned, and it was as a last resort that the Board wrote to Jones at what it thought was an out-dated address. The Board argues that it took reasonable measures to contact Jones and should not be held liable because of its lack of success in doing so.

Jones contends that the Board did know or should have known that the letters of February 2 and 18 would never reach him because the address to which they were sent was one of the Parish schools. The Board ought to know the addresses of its own schools. Further, the Board had a complete personnel file on Jones which contained his correct address, yet when Mr. Hebeisen's office attempted to contact him prior to termination, that address was not located. However, when it came time to notify Jones of

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(Footnote 6 continued)
terminated and his alleged abandonment was merely asserted as a ground for termination. Furthermore, the Board conceded that it terminated Jones by raising as a defense to the Title VII claim its contention that Jones was discharged for abandonment.

final termination, the correct address suddenly appeared. Jones contends that these facts prove that the Board did not do all it should have done to notify him of the pending action so that he could defend against it.

Although this evidence was presented to the district court, its conclusion that the § 1983 action was time-barred precluded resolution of the due process claim. Many of the facts bearing upon the claim were brought out at trial because they related to the Title VII race claim. The court made no factual findings or legal conclusions concerning the alleged due process violations, however. When summarizing the sequence of events leading to Jones' termination, the court merely noted the conflicting evidence and did not attempt to resolve the conflicts since that evidence was not crucial to the resolution of the Title VII claim. So we are faced with a situation where most of the relevant facts were brought out at a trial, but the district court did not evaluate these facts. Nevertheless, "[f]act-finding is the basic responsibility of district courts rather than appellate courts, and...the Court of Appeals should not [resolve] in the first instance [a] factual dispute which [has] not been considered by the District Court." *Pullman-Standard v. Swint*, __ U.S. __, __, 102 S.Ct. 1781, 1791, 72 L.Ed.2d 66 (1982). Therefore, we must remand this issue to the district court so that it may consider the evidence already adduced, as well as any additional evidence which is relevant to the issue, to determine whether Jones' right to due process was violated.

III. *The Title VII Claim*

Jones argues that the district court erred in concluding that he failed to prove a claim of racial discrimina-

tion under Title VII.[7] Having reviewed the record, we conclude that the court was correct in finding that Jones' offered no evidence whatsoever which in any way remotely infers that he was discharged because of his race." The evidence showed that the Board discharged Jones because it believed that he had abandoned his job. Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge. *DeAnda v. St. Joseph Hospital*, 671 F.2d 850, 854 n.6 (5th Cir. 1982).

Next, Jones argues that the court erred in refusing to admit evidence of a custom or policy of discrimination on the part of the Board as well as evidence that he was discharged in retaliation for filing a complaint with the Board against a school principal in 1971. The court permitted Jones to pursue a line of questioning concerning a custom or practice of discrimination until it became clear that the witness from whom he was attempting to elicit this evidence was unable to answer his questions. Then, the court directed Jones to move on to another subject. As to the evidence of retaliation, when Jones attempted to introduce the 1971 complaint, the court ruled that events which occurred that long ago were irrelevant. Jones did not object to this ruling nor did he explain the relevance of this evidence to the court. We find no error in these evidentiary rulings. The court was correct in concluding that Jones did not prove his Title VII claim.

IV. *State Law Claims*

Finally, Jones alleges various state law claims in-

[7] There is no statute of limitations issue under the Title VII claim of racial discrimination. Suit was filed three months after receipt of the right to sue letter from the EEOC.

cluding breach of contract and violation of the Louisiana Teacher Tenure Laws. These claims were not pleaded in Jones' complaint nor were they mentioned in the pre-trial order. When Jones attempted to present evidence on these claims at trial, the Board objected on the grounds that the claims were not pleaded and that the pendent jurisdiction of the federal court had not been invoked. Because the state law claims were not properly presented in the court below, these issues are not before us on appeal. *Daly v. Sprague*, 675 F.2d 716 at 722 (5th Cir. 1982).

V. *Conclusion*

We hold that the court below was correct in concluding that Jones' claims of racial discrimination under §§ 1981 and 1983 were time-barred by the one year limitations period of La.Civ.Code art. 3536. We find that the court erred in concluding that the 8 1983 due process claim was time-barred. We remand the case to the district court for consideration on the merits of the due process claim. We affirm the court's judgment against Jones on the Title VII claim since the record contains no evidence showing that Jones was terminated on account of his race. The state law claims posed by Jones are not properly before us on this appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

A-14

Hurie JONES, Plaintiff-Appellant,

v.

ORLEANS PARISH SCHOOL BOARD,
Defendant-Appellee.

No. 81-3204

United States Court of Appeals,
Fifth Circuit.

Oct. 4, 1982.

Black school teacher brought suit alleging he had been discharged unlawfully on basis of his race and that he had been denied due process. The United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., rendered judgment for school board, and the plaintiff appealed. The Court of Appeals affirmed in part, reversed in part and remanded, 679 F.2d 32. On suggestion of the school board for rehearing en banc, treated by the court as a petition for panel hearing, the Court of Appeals, Jerre S. Williams, Circuit Judge, withdrawing in part the previous opinion, held that: (1) within Louisiana statute providing one-year prescriptive limitations period for "offense and quasi-offenses," tenured teacher's claim that his procedural due process rights had been violated by school board's actions in terminating him charged an "offense" in nature of constitutional tort against school board and (2) such teacher's section 1981 and section 1983 claims of racial discrimination in employment were governed by Louisiana one-year limitations period applying to "offenses and quasi-offenses" and were time barred, and same was true of his section 1983 due process claim as well.

Affirmed with opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 21, 5 Cir., 1982, 679 F.2d 32)

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In this case the Orleans Parish School Board filed a petition suggesting a rehearing en banc of our panel opinion, 679 F.2d 32 (5th Cir. 1982). Treating the suggestion for rehearing en banc as a petition for panel rehearing, rehearing is GRANTED. The panel withdraws that portion of its prior opinion titled "II. Due Process" and that portion titled "V. Conclusion". Upon careful reconsideration, the panel concludes that Jones' claim under 42 U.S.C. § 1983 of a due process of law violation under the Fourteenth Amendment is barred by the Louisiana prescription statute.

We do not restate the complicated factual situation. We need only say that after a leave of absence as a tenured teacher in the Orleans Parish Public Schools, Hurie Jones was terminated for having "abandoned [his] position". Jones claimed that he was terminated as an instance of racial discrimination, suing under 42 U.S.C. §§ 1981 and 1983, and that his procedural due process rights had been violated by the school board's actions under 42 U.S.C. §

1983. Further, his claim of racial discrimination was also based upon Title VII, 42 U.S.C. § 2000e et seq.

In our prior opinion, we affirmed the decision of the district court that a Title VII claim of racial discrimination had not been established. We applied the Louisiana one-year statute of limitations, La.Civ.Code, art. 3536, in barring his claim of racial discrimination under § 1981. However, we decided that the § 1983 due process claim was not time-barred because we applied the three-year limitations period of La.Civ.Code, art. 3538, basing our decision on his status as a tenured teacher and his suit for reinstatement and back pay.

Reconsideration of our holding with respect to the applicable prescription period of the § 1983 claim under the Louisiana statutes convinces us that the one-year prescriptive period of art. 3536 is applicable to the 1983 due process claim as well. We substitute the following for the section of the prior opinion titled "II. Due Process," 679 F.2d at 36.

II. Due Process

The one-year Louisiana prescriptive limitations period applies to "offenses and quasi-offenses." La.Civ.Code, art. 3536. The claim by Jones that his procedural due process rights had been violated in his termination by the Orleans Parish School Board is a charge of an "offense" in the nature of a constitutional tort against the school board.

It is well established in decisions in this Circuit that wrongs committed by Louisiana state officials in violation of federal law are considered to be torts subject to the one-

year prescriptive period. *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980); *Proctor v. Flex*, 567 F.2d 635 (5th Cir. 1978); *Humble v. Foreman*, 563 F.2d 780 (5th Cir. 1977), *reh. denied*, 566 F.2d 106.

Moving more specifically to the kind of governmental action charged in this case, we have also held that unauthorized public actions against tenured teachers, including procedural defaults, are treated as torts for purposes of statutes of limitations. *Braden v. Texas A&M University System*, 636 F.2d 90 (5th Cir. 1981); *Rubir v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981); *Heyn v. Bd. of Supervisors of Louisiana State University*, 417 F.Supp. 603 (N.D.La.1976), *aff'd*, 550 F.2d 1282 (5th Cir. 1977). Finally, we find no specific code provision or decision in Louisiana which would authorize the application of the three-year statute of limitations to the Jones procedural claims.

In the light of these decisions, we must conclude that *Pegues v. Morehouse Parish School Bod.*, 632 F.2d 1279 (5th Cir. 1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2322, 68 L.Ed.2d 844 (1981), does not, standing alone, support the application of the three-year prescriptive period in this case. While the Court speculated in that case that the three-year Louisiana prescription period might apply to a tenured teacher who sued for violation of his contractual rights, the actual holding was to the effect that a claim of racial discrimination was barred under the one-year limitation period. We cannot find sufficient authority in *Pegues* to establish that the three-year period is applicable to this claim of a constitutional due process violation. We conclude that Jones' due process claim under § 1983 also is time-barred.

Upon rehearing, therefore, we substitute the following statement of the Court's conclusion for that contained in our earlier opinion, 679 F.2d at 38.

V. Conclusion

We hold that the court below was correct in concluding that Jones' claims of racial discrimination under §§ 1981 and 1983 were time-barred by the one-year limitations period of La.Civ.Code, art. 3536. We also affirm the holding of the court below that the § 1983 due process claim was time-barred under the same Louisiana prescriptive code provision. We affirm the court's judgment against Jones on the Title VII claim since the record contains no evidence showing that Jones was terminated on account of his race. The state law claims posed by Jones are not properly before us on this appeal.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HURIE JONES	CIVIL ACTION
versus	NUMBER 77-2585
ORLEANS PARISH SCHOOL BOARD	SECTION "F" (5)

Filed March 5, 1980

SPECIAL MASTER'S FINDING AND RECOMMENDATION

Pursuant to the Order of Reference of the Honorable Lansing L. Mitchell, United States District Judge, under the provisions of 42 U.S.C. 2000e-5(f)(5), this Civil Action was tried before the Honorable James D. Carriere, United States Magistrate. Based on the evidence adduced at trial, there follows Findings of Fact, Conclusions of Law and a Recommendation of Judgment. The trial transcript will be filed in the record.

STATEMENT OF THE CASE

This Civil Action arises under Title VII of the Civil Rights Act of 1964 and under the Civil Rights Act of 1870, 42 U.S.C. 1981, 1983. Plaintiff, Hurie Jones, alleges that defendant, Orleans Parish School Board, discriminated against him and denied him due process because of his race in that it discharged him from the position of tenured teacher. Defendant denies that race played any part in the discharge decision and asserts that plaintiff was discharged

because he abandoned his position.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff, Hurie Jones, is a black male. Defendant, Orleans Parish School Board, is an independent body politic and is an employer within the meaning of 42 U.S.C. 2000e(b). Plaintiff filed a complaint with the Equal Employment Opportunity Commission alleging race discrimination. On May 17, 1977, the Department of Justice issued plaintiff a right to sue letter and this Civil Action was timely filed on August 19, 1977. Exhibit P-15.

2. Plaintiff was discharged by the Orleans Parish School Board on March 8, 1976. Since this Civil Action was not filed within 12 months after plaintiff's discharge, his claim under 42 U.S.C. 1981, 1983 has prescribed and must be dismissed. Kissinger v. Foti, 544 F.2d 1257 (5 Cir. 1977).

3. The evidence discloses that plaintiff was employed by defendant in August, 1966. Exhibit P-1. In due course, plaintiff became a tenured science teacher. Between August, 1972 and January, 1973, plaintiff, at his request, was on leave without pay status. From January, 1973 to January, 1974, plaintiff was on sabbatical leave for the purpose of "professional & cultural improvement." Exhibit P-2. In January, 1974, plaintiff returned from leave. He complied with defendant's return from leave procedure, to wit: he brought a completed medical form to the Personnel Office in person where he was given the required return from leave interview. From June, 1974 to May, 1975, plaintiff again took leave without pay this time "to settle personal and family-related business." Exhibit P-5. This Court finds that in fact, plaintiff attended law school as a student during the various leaves of absence. On July 26, 1974,

defendant notified plaintiff that his latest leave of absence without pay was granted.

> "with the explicit understanding that there will be no extensions authorized for the leave and that you will notify me (the Assistant Superintendent for Personnel) no later than June 1, 1975, whether you are returning to a teaching assignment for the 1975-76 year or whether you are resigning your position." Exhibit P-6.

4. On May 30, 1975, plaintiff by certified mail notified defendant "it is my irrevocable intention to return to my teaching duties for the 1975-76 school year." Exhibit P-7. On June 4, 1975, defendant wrote plaintiff in part as follows:

> "If you desire to return from leave, the enclosed medical form(s) must also be completed by you and your attending physician. When completed, please bring the medical form(s) into the Division of Personnel in person so that you may be interviewed regarding your return from leave."150

This June 4 letter also contained a tearoff sheet whereupon plaintiff was to state his intention to return or not and to identify his current address. Plaintiff signed the form and indicated that he would return to teaching. Unfortunately, plaintiff erroneously put his prior school assignment address on the form and not his home address. Plaintiff returned the form to defendant. Exhibits P-8A, 8B.

5. On August 24, 1975, plaintiff again wrote defendant as follows:

> "I am scheduled to return to teaching duties in the fall of 1975, and having complied with all prerequisites thereto, I am still waiting for an

assignment to a teaching position." Exhibit P-9.

Plaintiff testified that in late August, he delivered a doctor's report to defendant. Exhibit P-8C. Defendant's house doctor, Gene Hassinger, M.D., testified that she did not receive plaintiff's medical report. She also testified that she would have required that plaintiff utilize the proper forms for his return to work medical report. Plaintiff testified that when he did not receive a school assignment, he made a couple of telephone calls to defendant's central office. He testified that when no one communicated with him, he felt that the defendant took "arbitrary, illegal" action against him and that he merely waited for the appropriate response from the School Board. He testified that in September, 1975, he returned to law school and graduated from law school in May, 1976.

6. Alfred Hebeisen, Assistant Superintendent of Personnel, testified that plaintiff by failing to personally come to the Personnel Office for a return to work interview as required by School Board policy "abandoned" his tenured teaching position. He testified that on February 2, 1976, he wrote plaintiff to

> "notify me by return mail any explanation you have to offer concerning your failure to return from your leave of absence....[B]ut in the absence of an acceptable explanation, I will, of necessity, recommend your termination...." Exhibit P-10.

On February 18, 1976, Hebeisen wrote plaintiff advising that plaintiff had abandoned his position as a teacher. Exhibit P-11. Unfortunately, these two letters were sent to the wrong address as supplied by plaintiff. See: Exhibit P-8B. On March 9, 1976, the Orleans Parish School Board

met and routinely terminated plaintiff. Exhibit P-12.

7. A plaintiff in a Title VII case must establish a prima facie case of discrimination. In 1976, defendant employed 5,000 school teachers. Approximately 55 percent were black. Both black and white school teachers have been terminated for abandonment of their positions, that is, failure to return to work after a leave of absence. Plaintiff offered no evidence to show that white teachers are treated any different than the black teachers. Plaintiff offered no evidence whatsoever which in any way remotely infers that he was discharged because of his race. See: Marks v. Prattco, 607 F.2d 1153 (5 Cir. 1979).

8. This Court finds that defendant has proved that its employment decision concerning plaintiff was based on his failure to report for a return from leave interview and was therefore, legitimate and non-discriminatory and did not violate Title VII. See: Adams v. Reed, 567 F.2d 1283 (5 Cir. 1978).

RECOMMENDATION

It is recommended that Judgment be entered in favor of defendant, Orleans Parish School Board, and against plaintiff, Hurie Jones, dismissing plaintiff's complaint at plaintiff's cost.

New Orleans, Louisiana, March 5, 1980.

/S/JAMES D. CARRIERE
JAMES D. CARRIERE
United States Magistrate

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HURIE JONES — CIVIL ACTION

VERSUS — NO. 77-2585

ORLEANS PARISH SCHOOL BOARD — SECTION "F"

This matter was submitted to the Court on a former date. The Court having considered the arguments of counsel, the memoranda submitted and the law applicable to the case; accordingly:

IT IS ORDERED that the motion of plaintiff, Hurie Jones, Jr. for summary judgment is DENIED.[1]

/S/LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

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[1] It appears on the face of the record that the petitioner's claims under 42 USC 1981 and 42 USC 1983 are prescribed. Plaintiff received a notice of termination on March 12, 1976. Suit was not filed until August 19, 1977. A one year prescriptive period applies to plaintiff's claims under 42 USC 1981 and 1983. *Heyn v. Board of Supervisors of Louisiana State University*, 417 Fs 603 (ED La.1976) affirmed 550 F.2d 1282, rehearing denied, 553 F.2d 100 and 554 F.2d 1065.

With regard to plaintiff's claim under Title VII, 42 USC 2000, there are issues of fact remaining as to whether or not plaintiff submitted his medical report to the School Board. Therefore summary judgment is not proper at this time.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3204

HURIE JONES,

Plaintiff-Appellant,

versus

ORLEANS PARISH SCHOOL BOARD,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/4/82, 5 Cir., 198__, __F.2d__).

(November 16, 1982)

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor

Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-3734

HURIE JONES, ET AL

Plaintiffs-Appellants

VS.

JOHN MITCHELL, ET AL

Defendants-Appellees

AND

NO. 81-3601

JOYCELYN M. JONES, ET AL

Plaintiffs-Appellants

VS.

JEFFERSON PARISH SCHOOL BOARD

Defendant-Appellee

AND

NO. 81-3204

HURIE JONES

Plaintiff-Appellant

VS.

ORLEANS PARISH SCHOOL BOARD

Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

PLEASE TAKE NOTICE THAT Appellants Joycelyn M. Jones, Hurie Jones, Mechelle D. Jones, Comeco C. Jones and Kim B. Jones are taking this consolidated appeal from the entire or complete judgments rendered and entered into the records of these cases against appellants by this court on October 18, 1982, October 28, 1982 and November 16, 1982.

This appeal, civil action No. 80-3734, is taken pursuant to Rules 10, 11, 12, 15, 28, 29 and 38 of the Supreme Court of the United States.

Further, Appellants are taking this appeal pursuant to the following Constitutional and statutory provisions: 28 U.S.C.A. Section 1331, 28 U.S.C.A. Section 1343, 42 U.S.C.A. Sections 1981, 1983, 1985 and the First, Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Finally the pendent jurisdiction of this court is invoked pursuant to Louisiana Civil Code Articles 2315, 2315.1, 2317, 2320 and 2324.

This appeal, in civil action No. 81-3601, is taken pursuant to Rules 10, 11, 12, 15, 28, 29 and 38 of the Supreme Court of the United States.

Further, appellants are taking this appeal pursuant to the following constitutional and statutory provisions; particularily the First, Fifth, and Fourteenth Amendments, 28 U.S.C.A. Section 1331, 28 U.S.C.A. Section 1343, 42 U.S.C.A. Section 1981, 42 U.S.C.A. Section 1983, 42 U.S.C.A. Section 1985, 28 U.S.C.A. Section 1915, Rule 24 (a) of the Federal Rule of Appellate Procedure, Rule 2.4 of the Local Federal Rules of Civil Procedure, Rule 8(a), 57

and 65 of the Federal Rules of Civil Procedure and 28 U.S.C.A. Section 2201.

Finally, pendent jurisdiction of this court is invoked, for the purpose of redressing appellants state law claims, pursuant to Louisiana Civil Code Articles 2315, 2317, 2320, 2324, R.S. 17:441, R.S. 17:443, R.S. 17:281, R.S. 17:391.5, R.S. 17:24.3c(2) through 12.

This appeal, civil action No. 81-3204, is taken pursuant to Rules 10, 11, 12, 15, 28, 29 and 38 of the Supreme Court of the United States.

Further, appellant is taking this appeal pursuant to the following constitutional and statutory provisions: specifically the First (1st), Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution and the applicable statutory provisions thereto; specifically 28 U.S.C.A. Section 1331, 28 U.S.C.A. Section 1343, 42 U.S.C.A. Section 1983, 42 U.S.C.A. Section 1985, 28 U.S.C.A. Section 2201 and 2202, 42 U.S.C.A. Section 2000 3-5 (f). Appellant's civil action is further authorized and instituted pursuant to Section 706 (F) (1) and (3) of Title VII if the civil rights act of 1864, as amended by the Equal Employment Opportunity Act of 1972, Public law No. 92-261, hereafter referred to as Title VII, 42 U.S.C.A. Section 1981, Rules 8(a) and 57 of the Federal Rules of Civil Procedure; accordingly, this court has jurisdiction over this controversy pursuant to the foregoing provisions.

Finally, pendent jurisdiction of this court is sought or invoked pursuant to R.S. 17:461, R.S. 17:462 and Louisiana Civil Code Articles 21, 1761, 1765, 1779, 1901, 1926, 1930, 1934(2) and (3), 2315, 2317, 2320, 2324, 3538 and 3544.

Appellants are appealing jointly or consolidated the two above described cases, styled as civil action No. 80-3734; Hurie Jones, ET AL VS. John Mitchell, ET AL and civil action No. 81-3601; Joycelyn M. Jones, ET AL VS. Jefferson Parish School Board; because both cases grew out of and evolved as an integral part of one joint and continuous covert conspiracy in which appellees acted jointly under color and pretense of state law, to deprive plaintiffs, appellants herein, of their rights, privileges immunities and entitlements as guaranteed by the United States Constitution by first denying appellants of equal protection of the laws and then by obstructing justice, in complicity with named third parties, and denying appellants of due process of laws in an attempt to conceal appellees, and their joint third party co-conspirators complicity in the first action, styled as Hurie Jones, ET AL VS. John Mitchell, ET AL, Civil Action No. 80-3734.

Further, appellants are appealing jointly or consolidated, in the same jurisdictional statement, the above described cases styled as Joycelyn M. Jones, ET AL VS. Jefferson Parish School Board, civil action No. 81-3601 and Hurie Jones VS. Orleans Parish School Board, Civil Action No. 81-3204; because the ultimate issues, arising under the Constitution of the United States and specific state statutory laws are identical.

/S/HURIE JONES
Hurie Jones

/S/JOYCELYN M. JONES
Joycelyn M. Jones
2103 La Quinta Via
Harvey, Louisiana 70058
(504) 367-9621
November 23, 1982

NO. 82-6274

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

HURIE JONES

Appellant

VS.

ORLEANS PARISH SCHOOL BOARD

Appellee

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, FIFTH CIRCUIT

BRIEF IN OPPOSITION

CHARLES T. CURTIS, JR.
POLACK, ROSENBERG, RITTENBERG,
& ENDOM
938 Lafayette Street
New Orleans, Louisiana 70113
Telephone: (504) 581-1422
Attorneys for Appellee,
Orleans Parish School Board

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HURIE JONES,

APPELLANT

VS.

ORLEANS PARISH SCHOOL BOARD,

APPELLEE

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, FIFTH CIRCUIT

BRIEF IN OPPOSITION

JURISDICTION OF THE COURT

Appellant has invoked the jurisdiction of the United States Supreme Court pursuant to 28 USCA §1331 and 1343. See Page 1 of Appellant's Jurisdictional Statement.

Appellee contends that this Honorable Court has jurisdiction over this matter pursuant to 28 USCA §1254 (1); and, therefore, the review by this Court should be by a writ of certiorari and not by appeal.

Appellee therefore requests that this Court apply the provisions of 28 USCA §2103 and treat appellant's appeal and jurisdictional statement filed herein as a petition for writ of certiorari. Appellee files herein a brief in opposition pursuant to the rules of Supreme Court Rule 22 instead of a motion to dismiss or affirm pursuant to Rule 16.

STATEMENT OF CASE

Appellant was first employed by appellee Orleans Parish School Board effective August 29, 1966. Appellant was notified that he had acquired tenure rights under the provisions of Title XVII, Section 461, Louisiana Revised Statutes of 1950, by letter dated October 28, 1969, from Mr. Alfred B. Hebeisen, then Assistant Superintendent for Personnel. Appellant remained in the active employ of appellee until August 28, 1972. At that time he requested a special leave of absence for personal reasons. On October 20, 1972, appellant requested a sabbatical leave for the purpose of taking education and administration graduate courses at Southern University in Baton Rouge. Appellant was granted sabbatical leave from January 23, 1973, until January of 1974. Appellant returned to his teaching duties in January of 1974 and was assigned to the Samuel J. Green Junior High School located at 2319 Valence Street, New Orleans, Louisiana, 70115. Appellant again requested another leave without pay from June, 1974, through May, 1975, "to settle personal and family related business." On July 26, 1974, appellee notified appellant that this leave of absence without pay was granted.

> "With the explicit understanding that there will be no extensions authorized for the leave and that you will notify me (the Assistant Superintendent for Personnel) no later than June 1, 1975, whether you are returning to a teaching assignment for the 1975-76 year or whether you are resigning your position."

On May 30, 1975, appellant, by certified mail, notified appellee, "It is my irrevocable intention to return to my teaching duties for the 1975-76 school year." On June 4, 1975, appellee wrote appellant a letter which read in part as follows:

> "If you desire to return from leave, the enclosed medical form must also be completed by you and your attending physician. When completed, please bring the medical form into the Division of Personnel in person so that you may be interviewed regarding your return from leave."

This June 4 letter also contained a tear-off sheet whereon appellant was to state his intention to return or not and to identify his current address. Appellant signed the form indicating that he would return to teaching. For some unknown reason, appellant put the address of S. J. Green Junior High School, 2319 Valence Street, on the form instead of his home address. Appellant then returned the form to appellee.

On August 24, 1975, appellant again wrote appellee as follows:

> "I am scheduled to return to teaching duties in the Fall of 1975, and having complied with all prerequisites thereto, I am still waiting for an assignment to a teaching position."

Appellant's original complaint alleges that on June 10, 1975, he mailed the required executed medical form to the Orleans Parish School Board. However, in his deposition appellant testified that he did not recall whether he mailed or delivered the medical form. Appellant testified at trial, after being extremely evasive, that he personally brought the medical form to the medical department. However, he could not remember where he actually allegedly brought the form. Gene Hassinger, M.D., house doctor for appellee, testified under direct examination that her office never received a medical report from appellant. It is submitted that appellant never delivered the medical form to appellee as required in appellee's letter of June 4, 1975. It is further submitted that appellant never came to the Division of Personnel in person so that he could be interviewed regarding his return from leave. The only action which appellant took to return to his job were his letters of May 29 and August 24. Appellant further testified that he made a few phone calls to the Central Office; however, this allegation is unsubstantiated. In truth and in fact appellant was attending law school during his sabbatical leave and leaves without pay and returned to law school in September, 1975, and graduated in May, 1976.

Mr. Alfred Hebeisen, then Assistant Superintendent of Personnel for the Orleans Parish School Board, testified that appellant by failing to personally come to the Personnel Office for a return to work interview as required by School Board policy and set forth in his letter of June 4, 1975, "abandoned" his tenured teaching position. On February 2, 1976, Mr. Hebeisen wrote appellant to:

> "Notify me by return mail any explanation you have to offer concerning your failure to return from your leave of absence...but in the absence of an acceptable explanation, I will, of necessity, recommend your termination..."

On February 18, 1976, Mr. Hebeisen again wrote appellant advising that he had abandoned his position as a teacher. Both of these letters were sent to the address supplied by appellant which was the address of the Samuel J. Green Junior High School and therefore returned to appellant undelivered. After several attempts to reach appellant which were fruitless, the Orleans Parish School Board met and routinely terminated appellant on March 9, 1976. Appellant filed suit on August 19, 1977, a period of almost one and one-half years after his termination, alleging that he had been discharged unlawfully on the basis of his race and that he had been denied due process pursuant to 42 U.S.C.A. §§1981, 1983 and 1985 and 42 U.S.C.A. §2000e et seq.

The District Court accepted the Magistrate's recommendation and rendered judgment for the School Board and Jones appealed. The United States Court of Appeals for the Fifth Circuit affirmed after panel rehearing. The Magistrates Finding and Recommendation as well as the opinions of the Court of Appeals may be found in the appendix of appellant's jurisdictional statement.

SUMMARY OF ARGUMENT

1.

Appellant's claim under 42 USCA §§1981, 1983 and 1985 are barred by the Louisiana one year Statute of Limitations, Louisiana Civil Code, Art. 3536.

2.

Appellant's Title VII claim was properly dismissed.

3.

Appellant's state law claims were not properly presented in the District Court and therefore those issues were not before the Court on appeal.

ARGUMENT

1.

Because Congress did not establish a limitation period for §§1981, 1983 and 1985 actions, Federal Courts apply the state law of limitations governing analogous causes of action. As clearly stated in the well reasoned opinion of the District Court and Court of Appeals such claims are best characterized under Louisiana law as a tort and should be governed by the one year limitations period of Louisiana Civil Code Article 3536. Page v. U.S. Industries, Inc., 556 F.2d 346 (5th Cir., 1977) Cert denied 434 U.S. 1045 98 S. Ct. 890, 54 L.ed. 2d 796 (1978). Further, appellant's claim of denial of his rights to due process in violation of §1983 is also subject to the one year limitation period of La. Civ. Code Art. 3536. Braden v. Texas A&M University System 636 F.2d 90 (5th Cir., 1981); Heyn v. Board of Supervisors of Louisiana State University 417 F. Supp. 603 (N.D. La. 1976), aff'd, 550 F.2d 1282 (5th Cir., 1977).

2.

After hearing the evidence the District Court concluded that appellant "offered no evidence whatsoever which in any way remotely infers that he was discharged because of his race." After reviewing the record the Court of Appeals concluded that the District Court was correct in so holding. The evidence showed that the Board discharged appellant because it believed that he had abandoned his position. Whether the Board was wrong in believing that Jones had abandoned his position is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge. DeAnda v. St. Joseph

Hospital 671 F. 2d 850, 854 n.6. (5th Cir., 1982).

3.

Appellant has alleged various state law claims including breach of contract and violation of the Louisiana Teacher Tenure laws. These claims were not pleaded in appellant's complaint nor were they mentioned in the pre-trial order. When appellant attempted to present evidence on these claims at trial, the Board objected on the grounds that the claims were not pleaded and that the pendant jurisdiction of the Federal Court had not been invoked. Because the state law claims were not properly presented in the trial court, these issues were properly not before the Court of Appeals. Daly v. Sprague 675 F. 2d. 716 at 722. (5th Cir., 1982).

CONCLUSION

The appellee submits that this Honorable Court should deny appellant's writ of certiorari or in the alternative, affirm the decision of the United States Court of Appeals for the Fifth Circuit because appellant failed to prove his claim of racial descrimination and appellant's allegation that his procedural due process rights had been violated were prescribed pursuant to Louisiana law. Further, appellant's various state law claims were not properly pleaded in the court below.

Both the District Court and the Fifth Circuit carefully considered each of appellant's allegations and found them all to be without merit. Accordingly, this Honorable Court should likewise deny appellant's writ.

Respectfully submitted,

Charles T. Curtis, Jr.
CHARLES T. CURTIS, JR.
Attorney for Appellee
938 Lafayette Street
New Orleans, Louisiana 70113
Telephone: (504) 581-1422

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been forwarded to Hurie Jones, 2103 La Quinta Via, Harvey, Louisiana, 70058, by United States mails, postage prepaid and correct, this 4 day of May, 1983.

Charles T. Curtis

CHARLES T. CURTIS, JR.

Supp to [redacted] Jurisdictional

No. 82- 6274

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1982

HURIE JONES
Appellant

V.

ORLEANS PARISH SCHOOL BOARD
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS
OR AFFIRM

Appellant, having been authorized to file this motion for an order pursuant to United States Supreme Court Rule 16.5, now urgently request that this court take immediate and decisive judicial notice of the fact that, pursuant to the Supreme Court Rules cited herein, appellee has waived all rights to file a motion to dismiss appellant's appeal nor is appellee entitled by law to file a motion to affirm the lower court's judgment, as erroneously contended by the clerk of this court, due to the documented fact that appellee failed to timely answer or respond by filing such motion after receiving actual notice of the filing of appellant's jurisdictional statement, pursuant to United States Supreme Court Rules 10.7, 12.4, 16.1 16.4. 16.5, 29.2, 29.3 and 29.4.

Thus, the document(s) attached herewith conclusively proves the fact and date on which appellee was served with three(3) copies of appellant's jurisdictional statements pursuant to supreme court Rules 12.3 and 28. Further as a direct result of appellee's failure to timely answer or respond, pursuant to the rules of this court alluded to above,

appellee is absolutely not entitled to engage in oral argument, in opposition to appellant in this case; pursuant to Supreme Court Rule 38.6 and all other rules of this court enunciated above.

Therefore, appellant submit that, pursuant to Supreme Court Rule 29.4, appellant is severely aggrieved by the shocking and chilling actions taken by the clerk of this court who has, contrary to all the rules of this court, including rule 16 as cited by the clerk in his letter to opposing counsel, dated April 15, 1983, which requested that appellee file a motion to dismiss or to affirm in opposition to appellant's jurisdictional statement; notwithstanding appellee express waiver of his right to file a motion to dismiss or to affirm by allowing the time period for filing such motion to expire.

Thus, any such motion(s), as alluded to above, filed by appellee in this case is absolutely out of time and must be summarily dismissed or denied acceptance.

IT IS ORDERED that appellant's motion for an order denying and rejecting appellee's motion to dismiss appellant's appeal or to affirm the lower court's judgment. Thus, Appellant's motion is hereby granted.

JUSTICE OF THE UNITED STATES SUPREME COURT

Hurie Jones

HURIE JONES
2103 LA QUINTA VIA
HARVEY, LOUISIANA 70058
PHONE # (504) 367- 9621

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion and order has been sent to opposing counsel, by placing same in the United States Mail, postage prepaid, on this 21st. day of April 1983.

Hurie Jones

Hurie Jones
2103 La Quinta Via
Harvey, Louisiana 70058
Phone # (504) 367- 9621

SUPREME COURT OF THE UNITED STATES

Hurie Jones
Petitioner—Appellant

No. 82- 6274

Orleans Parish School Board
Respondent—Appellee

To Charles T. Curtis, Jr. Counsel for Respondent—Appellee:

YOU ARE HEREBY NOTIFIED that ~~a petition for a writ of certiorari~~—an appeal—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 22nd day of February, 1983.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed with the Clerk by the counsel of record who will represent your party. The form should be filed at or before the time you file your response to our petition—jurisdictional statement.

Only counsel of record can expect to receive notification of the Court's action(s) in this case.

HURIE JONES
Counsel for Petitioner—Appellant

2103 LA QUINTA VIA
Number and Street

HARVEY, LOUISIANA 70058
City, State and Zip Code

(504) 367- 9621
Telephone Number

NOTE: Please indicate whether the case is a petition for certiorari or an appeal by crossing out the inapplicable terms. A copy of this notice should *NOT* be filed in the Supreme Court.

CO-75A

IN THE SUPREME COURT OF THE UNITED STATES

Application No. 551

HURIE JONES
APPELLANT

VS.

ORLEANS PARISH SCHOOL BOARD
APPELLEE

CERTIFICATE OF SERVICE

I do hereby certify that I have received three (3) copies of Appellant's Jurisdictional Statements on behalf of all Appellee(s) in this case, this 16 day of February 1983.

Charles T. Cantrell
Signature of Attorney or Authorized Agent

IN THE UNITED STATES SUPREME COURT

Application No. 551

HURIE JONES
Plaintiff- Appellant

VS.

ORLEANS PARISH SCHOOL BOARD
Defendant- Appellee

AFFIDAVIT OF SERVICE OF DOCUMENTS

I do hereby certify, pursuant to Rule 28 of the Supreme Court of the United States, that all parties to this case or controversy required to be served have been served with three (3) copies of appellant's Jurisdictional Statements for the foregoing styled case; by placing copies of the same in the United States Mail, postage pre-paid this 14th day of February 1983.

Hurie Jones
HURIE JONES

Joycelyn M. Jones
JOYCELYN M. JONES
2103 La Quinta Via
Harvey, Louisiana 70058
(504) 367-9621

Attorney for Appellee
Charles T. Curtis, Jr.
1006 Hibernia Bank Building
New Orleans, Louisiana 70112
(504) 581- 1422

Subscribed and sworn before me this 11th day of February 1983 at [illegible] Parish, Louisiana.

[illegible]
Notary's Signature
MY COMMISSION IS [illegible]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 15, 1983

Charles T. Curtis, Jr., Esq.
1006 Hibernia Bank Building
New Orleans, Louisiana 70112

Re: Hurie Jones v. Orleans Parish School Board
No. 82-6274

Dear Mr. Curtis:

On February 22, 1983, a jurisdictional statement in the above case was filed in this Court to review an order of the U. S. Court of Appeals for the Fifth Circuit (No. 81-3204), dated June 21, 1982.

The Court has directed this office to request that a response be filed in this case. The response in appeals normally takes the form of a motion to dismiss or affirm, as provided for in Rule 16 of the rules of this Court. Ten typewritten or otherwise reproduced copies of your response together with proof of service thereof, should reach this office on or before May 16, 1983.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Alexander L. Stevas
Clerk

cc: Mr. Hurie Jones
2103 La Quinta Via
Harvey, Louisiana 70058